The Dow Chemical Company *and* Local 12075, United Steelworkers of America, AFL–CIO–CLC. Case 7–CA–18150

April 16, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On September 23, 1981, Administrative Law Judge Stanley N. Ohlbaum issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, The Dow Chemical Company, Midland, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, as so modified:

Substitute the following paragraph for paragraph B,1:

"1. Adjust and correct the seniorities and all other contractual benefits or emoluments of said bargaining unit employees, so as to rectify any impairment thereof which occurred because of Respondent's assignment, transfer, detail, or 'loan out' of any of said unit employees from his or her regular work assignment for a period in excess of 45 days without union steward approval, or in excess of an additional 45 days with union steward approval."

[1] The 1977–80 collective agreement limited the "loan out" of employees to 45 days, without steward approval, while the 1980–83 collective agreement limits this "loan out" to 45 days without steward approval with an additional extension of 45 days with steward approval. We shall modify the Administrative Law Judge's recommended Order accordingly.

Respondent's request for oral argument is hereby denied as the record and the brief adequately present the issues and the positions of the parties.

DECISION

PRELIMINARY STATEMENT; BASIC ISSUE

STANLEY N. OHLBAUM, Administrative Law Judge: This proceeding[1] under the National Labor Relations Act, as amended (29 U.S.C. Sec. 151, *et seq.*; the Act, was litigated before me in Midland, Michigan, on July 9, 1981, with all parties participating throughout by counsel or other representative, who were afforded full opportunity to present evidence and arguments, as well as to file post-trial briefs received on August 11 (General Counsel) and August 31 (Respondent). The record and briefs have been carefully considered.

The complaint alleges and the answer denies that Respondent violated Sections 8(a)(5) and (1) and 8(d) of the Act through unilaterally modifying the parties' collective labor agreement during its term by temporarily reassigning certain employees to other jobs in excess of the contractually permissible periods or without the required concurrence of union stewards and through insisting it has that right and will continue to exercise it.

Upon the entire record and my observations of the testimonial demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

At all material times Respondent has been and is a Delaware corporation with its principal office and place of business in Midland, Michigan (as well as plants in other States), the site of the controversy involved herein. At those times Respondent has been and is engaged in the manufacture, sale, and distribution of chemicals, plastics, and related products. In that business during the representative calendar year 1979 immediately preceding issuance of the complaint, Respondent manufactured at, and sold and distributed from, its Midland facility goods and materials valued at over $500,000, of which over $50,000 worth were shipped therefrom directly in interstate commerce to places outside Michigan.

I find that at all material times Respondent has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; and that at all those times the Charging Party Union has been and is a labor organization as defined in Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts as Found*

Respondent's Midland plant has been unionized for over 30 years. Since around 1971, hourly paid employees there have been represented by the Charging Party Steelworkers Union. The parties' industrial relations agreement have memorialized in successive collective labor contracts, the most recent effective from February

[1] The complaint was issued by the Board's Regional Director for Region 7 on October 1, growing out of charge filed by the Charging Party Union on August 18, 1980.

18, 1980, to February 14, 1983 (Jt. Exh. 3), succeeding that of February 21, 1977, to February 18, 1980 (Jt. Exh. 1).

For many years Respondent has utilized hourly paid painters, employed by it on its own payroll and included in the bargaining unit covered by these collective agreements, for painting maintenance of its equipment and the many buildings comprising its Midland facility. At the same time Respondent has also utilized independent contractors, not in its employ, for painting new construction.

Respondent's unit painters' jobs are all regularly scheduled day-shift jobs, generally held by high-seniority (i.e., at least 14 years) employees.

Although Respondent's hourly paid painter employees have on occasion been placed on layoff during the cold season winter months, prior to the winter of 1979–80 they had not been detailed, temporarily transferred, or "loaned out" to other departments for nonpainting work. That winter (1979–80), however, they began to be so "loaned out," in accordance with the then-subsisting collective agreement (1977–80; Jt. Exh. 1, art. II, sec. 16, pp. 32–33) limiting such "loans" to 45 days. Under that (as well as the succeeding, current) collective agreement, hourly paid employees on such "loans" are precluded from utilizing plant or departmental seniority when exercising their "bumping" rights to other jobs.

During the parties' 1980 negotiations resulting in their current (1980–83; Jt. Exh. 3) collective agreement, the subject of Respondent's contracting out of painting work was discussed, including Respondent's right occasionally to utilize its unit painting employees for painting work while their own department was on temporary shutdown; and, toward the end of those negotiations, there also came under discussion the subject of guaranteeing a certain number of jobs for the unit painters, with the proviso that during the winter months, if their own work was slow, it might be necessary to "lend" them out to other departments.

The parties' 1980–83 (subsisting; Jt. Exh. 3) collective agreement, while containing no provision guaranteeing jobs to any of Respondent's unit painter employees, essentially carries forward the described "loan out" provisions of the prior (1977–80; Jt. Exh. 1) collective agreement, with the modification that an additional 45-day "loan out" period was permitted "with Steward approval" (Jt. Exh. 3, art. II, sec. 16, p. 32).

Subsequent to execution of the current (1980–83; Jt. Exh. 3) collective agreement, a controversy arose between the parties concerning the permissible length of time for which Respondent's unit painter employees could be "loaned out" by Respondent to work in other departments. All efforts by the parties to resolve the controversy, including the 5-step grievance procedure provided by the collective agreement, failed; and Respondent, in accordance with its right under the collective agreement, refused to submit the matter for resolution through arbitration (Jt. Exh. 3, art. III, sec. 3, pp. 47–48), while the Union, although having the right under the collective agreement to strike because Respondent's refusal to arbitrate (*id.* at p. 48), has not exercised its right to strike. In refusing to arbitrate, Respondent took the position that the "issue [is not one] for arbitration [since the] matter was fully negotiated by our bargaining teams earlier this year." (Jt. Exh. 9; a letter dated Sept. 3, 1980.)

Additional Underlying Circumstances

Painters' jobs at Respondent's Midland mall—consisting of some 600–700 buildings spread over considerable acreage, employing around 3,400 hourly paid employees in the described bargaining unit are considered "desirable" in terms of pay and regular daytime hours. Thus, there were 27 applicants for 1 or 2 recent vacancies for such a job. Painting is, however, seasonal, with no outdoor painting during the winter and double the amount of painting (since outdoor as well as indoor) during the summer—to such an extent that, in addition to its regular complement of 40–75 full-time regular, year-round unit painters, Respondent has been hiring 10 to 20 temporary (less than 90 days) extra painters during the summer. Although Respondent's regular complement of unit painter employees was 69 in 1974, it had shrunk to only 40 by the time of the instant hearing (July 1981). The decline in Respondent's regular unit painter employees has been accompanied by a rise in the outside independent painting contractors it has hired; compared to 10 to 20 in 1979, Respondent now utilizes approximately 150 outside painter contractors.

This movement away from using its own unit painting employees and toward using outside painting contractors was discussed during the parties' 1980 contract negotiations resulting in their current (1980–83; Jt. Exh. 3) collective agreement. Respondent indicated it planned to contract its painting work out (as it had, at least to a degree, in the past) as more economical. According to uncontroverted credited testimony of longterm union bargaining committeeman Charles R. Groulx, who is still in Respondent's employ after 31 years, unsuccessfully sought to eliminate the following wording of the 1977–80 collective agreement (Jt. Exh. 1, art. XI, sec. 2) from the 1980–83 collective agreement (Jt. Exh. 3, art. XI, sec. 2), and a comparison of the two provisions shows it remained verbatim unchanged:

Section 2—Plant Management

* * * * *

> Except for evaluation purposes, the methods of accomplishing which will be worked out with the Union, the Company will not contract maintenance work when sufficient employees who can do the work and who have seniority are available.

During the 1980 contract negotiation period, Respondent's unit painter employees were for the first time "loaned out" to other departments, even though there was seemingly or arguably no "shutdown" of the painting department such as required to trigger the "loan out" provisions of the collective agreement (Jt. Exh. 1, Sec. 16). Unit painters complained to Groulx that their seniority was being impaired thereby—which would not have been the case if they had been laid off, since they could

then have exercised their "bumping" rights, which they could not do while out "on loan."

Uncontroverted credited testimony of Union Shop Steward Donald D. Wagar, also now employed by Respondent for over 30 years, establishes that on January 9, 1980, he and other paint shop stewards were informed by Respondent's paint shop superintendent, Brian McInerney, that 20 unit painters would be "loaned out" on a "temporary shutdown" of the painting department under article II, section 16, of the collective agreement—even though the department was not actually shut down and there was sufficient work to carry on until the following spring. But McInerney stated that the plant needed "production" workers, so he transferred or "loaned out" 20 painters to "production" jobs elsewhere in the installation. When the stewards asked for how long, McInerney's response was, "45 days or more, or up until the first day of May when the summer program . . . [will] start." The stewards did not agree, pointing out that there was enough painting work and that, if there were not, layoff (i.e., without loss of seniority and with unimpaired "bumping" rights) was the proper procedure. When the stewards took this up with Chief Union Steward Spann, he agreed with the stewards' position; but, when the stewards reported this to McInerney, he indicated he would initiate a "partial departmental shutdown" of the painting department in order to "loan out" 20 painters for production work, and he did so on January 21, 1980. The union bargaining committee decided to proceed with a grievance if the "loan" period exceeded 45 days. The 20 painters "loaned out" on January 21, 1980, were returned to their painting jobs as follows:[2]

Date 20 Unit Painters were "Loaned Out"	*Date Retd.*	*No. Retd.*	*No. of Days "On Loan"*	
			Gross Days	*Working[3] Days[4]*
1/21/80	3/23/80 or 3/26/80	6	64 or 66	47 or 49
1/21/80	4/21/80	14	91	66

During these "loan out" periods to "production" departments, unit painters so "loaned out" complained of experiencing skin rashes from chemical exposures, not being allowed a rest break, and being assigned to the night shift.

The February 21, 1977–February 18, 1980, collective agreement (Jt. Exh. 1) by its terms permits "loan outs" of "employees whose jobs are not operating" for a period not exceeding 45 days in case of "temporary shutdown" or "partial shutdown" (*id.* at art. II, sec. 16, p. 32); and the ensuing February 18, 1980–February 14, 1983, collective agreement (Jt. Exh. 3) permits "loan outs" of "affected employees" during a "temporary shutdown, or a partial reduction in manpower requirements of forty-five days or less, with an additional extension of forty-five days *with Steward approval*" (*id.* at art. II, sec. 16, p. 32; emphasis supplied). Thus, under the 1977–80 collective agreement the permissible 45-day limitation for "loan outs" was here exceeded; and also, since it is uncontroverted that stewards approval was not obtained for any extension of the 45-day "loan out" period, the permissible 45-day "loan out" period was likewise exceeded under that 1980–83 collective agreement.[5]

During the winter of 1980–81, the union stewards were again informed by Paint Shop Superintendent McInerney, over their opposition, that Respondent would again be "loaning out" 10–20 painters "through the winter months," and in fact 10 were so "loaned out" in the latter part of November 1980 and the remaining 10 on November 24, 1980. On March 9, 1981, four more unit painters, and on March 16, 1981 still another, were "loaned out." These were returned to their painting jobs on or about as follows:[6]

Date Unit Painters were "Loaned Out"	*Number "Loaned Out"*	*Date Retd.*	*No. Retd.*	*No. of Days "On Loan"* *Gross Days/Working Days*
Days				
11/80	20	4/13/81	3	Far in excess of 45 or 90 days; up to approx. 6 mos.
		4/15/81	2	
		5/11/81	9	
		5/18/81	6	
3/81	5	3/23/81	5	Less than 45 days

[2] Although the exact numbers and dates are not altogether clear under the evidence submitted, this would not seem to be significant in view of Respondent's insistence that it had the right to "loan out" these employees for over 45 days.

[3] Excluding date of return; if included, should be added.

[4] Excluding Saturdays and Sundays; to extent, if any, included, should be added.

[5] Respondent's argument here that the painters in question were not "loaned out" for over 45 days under the 1977–80 collective agreement since that agreement expired (on February 18) before the 45 days were up, and also for the same reason not "loaned out" for over 45 days after the inception (on February 18) of the 1980–83 collective agreement, is rejected as specious. Under both agreements the basic 45-day period is the same. It is well settled that even in any hiatus period (*none here*) between successive collective agreements, the existing collective agreement provisions are projected forward. In any event, even artificially calculating from February 18 the "loan out" period of the 14 unit painters who were returned to their painting jobs on April 21, the 45-day period was exceeded by gross count (unless all Saturdays and Sundays are excluded). The plain fact of the matter is that the unit painters were "loaned out" for the uninterrupted periods shown in the chart in the text, *supra*. The "loan out" period was a continuous, uninterrupted period which subtended both contracts and merged, in the same manner as seniority, sick leave entitlement, retirement pensions, disability, vacation, and other contractual accruals. General Counsel witness Groulx's uncontroverted, credited testimony establishes that at no time during the contract negotiations was any contention such as raised at the instant hearing made by Respondent, or that the dovetailing contracts should be regarded as separable only in respect to the 45-day "loan out" periods.

[6] Although the exact numbers and dates are not altogether clear under the evidence submitted, this is of no real significance here, in view of Respondent's position that it had the right to "loan out" these employees for over 90 days.

Again, in no instance was any "Steward approval" (Jt. Exh. 3, art. 11, sec. 16, p. 32) obtained for any "loan out" exceeding 45 days. And again, according to the uncontroverted, credited testimony of Union Steward Wagar, there was ample painting work on hand to be done—this time it was being done by plant employees other than painters; and, in the summer of 1981, no temporary extra painters were hired, but some 150 outside painting contractors were utilized. Since, during this "loan out" period the proportion of supervisors to painters (at one point 7 to 15) was not reduced, the resulting cost ratio caused cancellation of some painting orders for Respondent's unit painter employees as too costly.[7] Also again, as in the preceding "loan out" earlier in 1980, "loaned out" unit painters complained about night-shift production assignments (six painters) and about hazardous work (for older men) required in cleaning out chemical tanks or vats.

In the face of the contract provisions set forth above governing the conditions and time limitations under which unit painters may be temporarily detailed or "loaned out" for other work, Respondent contends that a contrary or different arrangement was in fact agreed upon during the parties' 1980 contract negotiations preceding execution of that contract; *viz*, that, in return for Respondent's informal alleged "guarantee" of retaining a minimum of 40 unit painters in its employ, the Union made certain concessions which sanction Respondent's described "loan outs" of unit painters for periods exceeding 45 days, and exceeding 90 days without the "Steward approval" stipulated in the contract (Jt. Exh. 3, art. II, sec. 16, p. 32), indeed for the full duration of the entire "winter" period. In support of this contention, Respondent has placed into evidence the verbatim minutes of those negotiations (Jt. Exh. 2), which the parties agree are accurate.

Respondent's 1979–80 industrial relations manager and bargaining committee chairman (now its govermental relations manager), Frank Neering, testified at the instant hearing that Respondent's initial 1980 position was that it wanted the right to contract out all painting work. He concedes that no negotiating positions were to be regarded as "agreed" upon until either formalized in writing or at least explicitly agreed upon by both sides' negotiating chairmen as reflected in the verbatim minutes. The subsisting collective agreement (1980–83; Jt. Exh. 3, art. XII, p. 106), as well as its predecessor (Jt. Exh. 1), provide that during the contract period "neither party hereto may reopen this Agreement for negotiation on any issue either economic or noneconomic." In no way does that instrument (or its predecessor) refer to any other agreement, side-agreement, or alleged understandings arrived at during the preliminary negotiations resulting in the contract.

Careful study of the negotiating minutes (Jt. Exh. 2; cf. G.C. Exhs. 3 and 4) now invoked by Respondent does not support its contention here. While it is certainly true that the "loan-out" of the unit painters during the winter months was discussed, a time period limitation thereon other than that to be found in the collective agreement itself was not discussed,[8] much less agreed to. Certainly there is nothing in those minutes, even were it to be assumed *arguendo*, that they could prevail over the clear language of the collective agreement—a position I am not prepared to accept—inconsistent with the plain provisions of the collective agreements here governing the conditions of and time limitations upon the "loan out" of unit employees.

After the conflict here concerning "loan out" of unit painters for over 45 days erupted, as indicated above, grievance and other discussions took place between the parties. Although it is true that at these meetings—*subsequent to execution of the collective agreement* (Jt. Exh. 3)—the matter of Respondent's nonadherence to the 45-day "loan out" limitation (or further 45-day extension with steward approval) was ventilated by the Union, which had requested the meeting with management, as disclosed by the minutes thereof (March 13, 1980; Jt. Exh. 4), certainly no contention by Respondent there, subsequent to contract execution, could be effective to vary the plain contract terms, being no more than the sort of argument raised by it at the instant hearing. Although it is apparent from a reading of the minutes of those *post contract* discussions that the parties were at total loggerheads over the time limitations on the "loan outs" (a conflict which has continued to this day), nevertheless, when the attention of company negotiator Neering was specifically called, at the March 13, 1980, *post contract* discussion, to the applicable contractual provision limiting the time period of "loan outs" and he was reminded that he never asked to change that, Neering's response was, *"No, I didn't want to because I didn't want to change that."* (Jt. Exh. 4, p. 2; emphasis supplied.)

As has already been stated, notwithstanding an extended grievance procedure through five steps, Respondent has refused (as is its right under the collective agreement) to submit the issue to arbitration, and the Union has forborne to exercise its right under the contract to strike, instead filing a charge with the Board that, by its described conduct in persisting in its position that it need not abide by the contractual provisions concerning limitations on its right to "loan out" painters, Respondent is attempting to impose a unilateral change in subsisting collective agreement provisions affecting the terms and conditions of employment of unit employees.

Upon the entire record, I find that it has not been established by a preponderance of the substantial credible evidence, as required, that the parties at any time agreed to any time governing the "loan out" of employees other

[7] It is stipulated by the parties that Respondent has the right to contract out painting so long as no unit painters are on layoff or on "loan."

[8] The following interchange occurred during the negotiating session of February 11, 1980 (G.C. Exh. 4, pp. 50–51):

> NEERING [Company negotiators]: Okay, and Bob said I didn't mention the additional 45 days in [art.] II—[sec.] 16, but I think we're alright.
>
> MAPEES [union negotiator]: Okay.
>
> NEERING: And they got a right to refuse.
>
> WITTBRODT [union negotiator]: A right to refuse temporary job 45 days—45 days with Steward approval and demolition and painting on TEMPORARY SHUTDOWN—maintenance painting.

This is indeed the substance of the provision actually included in the signed collective agreement (Jt. Exh. 3, art. II, sec. 16, p. 32).

than those limitations expressly set forth in their collective agreements; namely, from 1977–80, limited to 45 days (Jt. Exh. 1, sec. 16, p. 32), and from 1980–83, limited to 45 days "with an additional extension of forty-five days with Steward approval" (Jt. Exh. 3, art. II, sec. 16, p. 32).

B. *Discussion and Resolution*

1. "Jurisdictional" issue

We deal first with Respondent's contention that the Board lacks jurisdiction in this case because, in Respondent's view, there is involved no more than a question of contract interpretation. I do not agree. The issues tendered by the pleadings are whether Respondent violated Section 8(a)(5) and (1), as well as Section 8(d), of the Act through unilaterally modifying a subsisting collective labor agreement without bargaining with its employees' bargaining representative and unilaterally changing that agreement during its term. That these issues are squarely cognizable, indeed required to be dealt with, under the Act by the Board, and that the Board does not exceed its statutory jurisdiction even by construing a labor contract in order to determine whether an unfair labor practice has occurred, see *N.L.R.B.* v. *C & C Plywood Corp.*, 385 U.S. 421 (1967).[9]

Respondent's contention that the Board lacks jurisdiction herein is accordingly rejected, and its motion to dismiss the complaint on that ground denied.

2. Basic issue

We pass to the basic issue in the case—whether Respondent violated Section 8(a)(5) and (1), as well as Section 8(d), of the Act through its described actions in transferring or "loaning out" for other than their regular work unit employees for periods of time in excess of those specified in the collective agreements to which Respondent was and is a party.

Since the collective agreements in question contain specific, clear, and unambiguous provisions limiting the time for which unit employees may be transferred or "loaned out" for other than their regular work—45 days under the 1977–80 agreement and, under the 1980–83 agreement, an additional 45 days upon approval of the union steward, and since Respondent has not only failed to comply therewith but also insists that it is not obligated to comply therewith, Respondent is in clear violation of those requirements, which it has taken upon itself to alter or modify unilaterally during the contract term, unless Respondent can establish by a preponderance of the substantial credible evidence its claims that (1) the Union waived those provisions or (2) an overriding agreement was concluded between itself and the Union negating or superseding those contractual provisions. Respondent has failed to establish either of these claims by the preponderating substantial evidence required to overcome the clear provisions in the collective agreements which it signed.

It is hornbook law that waiver will not be lightly inferred, since it may result in forfeiture of important rights not intended to be relinquished. Accordingly, a heavy burden rests upon a party asserting a waiver to establish by it clear and convincing proof. The nature and degree of proof required to establish waiver have repeatedly been clearly delineated.

To begin with, waiver—that is, voluntary relinquishment of a right—must be "clear and unmistakable." *Tide Water Associated Oil Company*, 85 NLRB 1096, 1098 (1949); *N.L.R.B.* v. *The Item Company*, 220 F.2d 956, 958–959 (5th Cir. 1955), cert. denied 350 U.S. 836, rehearing denied 350 U.S. 905. Neither silence in the bargained agreement (*The Timken Roller Bearing Company* v. *N.L.R.B.*, 325 F.2d 746, 750–754 (6th Cir. 1963), cert. denied 376 U.S. 971 (1964); *N.L.R.B.* v. *J. H. Allison & Co.*, 165 F.2d 766, 768 (6th Cir. 1948), cert. denied 335 U.S. 814, rehearing denied 355 U.S. 905; *Sun Oil Company of Pennsylvania, Inc.*, 232 NLRB 7 (1977)) nor even a contractual "wrap-up" or "zipper" provision (*The General Electric Company* v. *N.L.R.B.*, 414 F.2d 918 (4th Cir. 1969), cert. denied 396 U.S. 1005 (1970); *Magma Copper Company, San Manuel Division* , 208 NLRB 329 (1974); *The Sawbrook Steel Castings Company*, 173 NLRB 318 (1968)) meets that test. Waiver "is not to be readily inferred and it should be established by proof that the subject matter was consciously explored and that a party has 'clearly and unmistakably waived its interest in the matter' and has 'consciously yielded' its rights." *Tucker Steel Corporation, and Steel Supply Company*, 134 NLRB 323, 332 (1961), and cases cited. Accord: *C & C Plywood Corporation*, 148 NLRB 414, 416–417 (1964), enforcement denied 351 F.2d 224 (9th Cir. 1965), reversed 385 U.S. 421.

Nowhere in or after the collective agreement is any waiver by the Union to be found. Failure to incorporate a statutory right in a collective agreement (e.g., to bargain concerning a modification) does not mean that it has been waived. *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410, 1413–14 (1964); *New York Telephone Company*, 219 NLRB 679, 680 (1975); cf. *J. I. Case Company* v. *N.L.R.B.*, 253 F.2d 149, 153 (7th Cir. 1958). In light of the record, the Union may hardly be deemed to have waived an express provision which is contained in the signed contract and which it has consistently continued to invoke. *Southwestern Bell Telephone Company*, 247 NLRB 171 (1980); cf. *Georgia Power Company*, 238 NLRB 572 (1978), enfd. 597 F.2d 769 (5th Cir. 1979); *Columbus Foundries, Inc.*, 229 NLRB 34 (1977), enfd. 84 LC ¶ 10,645 (5th Cir. 1978); *New York Telephone Company, supra; New York Telephone Company*, 219 NLRB 685

[9] It is additionally noted that, notwithstanding its insistence that the Board has no jurisdiction because the question is purely one of contract interpretation, Respondent has continued to refuse the Union's offer to submit the issue to arbitration under the contract's terms. Respondent thus casts itself in the dubious position that it alone is the judge over the issue presented (excluding the possibility of civil suit by the Union for breach, or to enjoin violation of, the collective agreement, which would not preempt the Board's assertion of jurisdiction). Unilateral contractual change or failure to bargain as required by the Act is a violation of the Act (*N.L.R.B.* v. *Katz, et al.*, 369 U.S. 736 (1962)), cognizable and remediable by the Board, even though it may also be a breach of contract. See *N.L.R.B.* v. *C & C Plywood Corp., supra; Smith* v. *Evening News Association*, 371 U.S. 195, 197 (1962); *Charles Dowd Box Co., Inc.* v. *Courtney, et al.*, 368 U.S 502, 511 (1962); *San Diego Building Trades Council et al.* v. *Garmon et al.*, 359 U.S. 236, 245–247 (1959); *C & S Industries, Inc.*, 158 NLRB 454, 456–460 (1966).

(1975); *North Carolina Finishing Division of Fieldcrest Mills, Inc.*, 182 NLRB 764 (1970).

Respondent's proof falls far short of meeting the legally required standards for establishment of waiver by the Union of the provisions in question, contained in the parties' collective agreement, which Respondent unilaterally purports to continue to modify.

Since there is neither evidence nor contention that the Union waived the contractual requirements in question at any time *after* execution of the contract, Respondent's waiver contention appears, rather, to rest upon the strange basis that such a "waiver" occurred *before* the execution of the 1980–83 contract so as to negate or supersede the contractual provision thereafter entered into. It is difficult to regard such a contention seriously, considering the fact that Respondent knowledgeably entered into the contract containing that provision, which, if unintended, it could readily have stricken from the contract or changed before signing it, and for the additional reason that, as shown above, the negotiations preceding the contract do not persuasively support its claim. For the same reasons, Respondent's contention that the Union bound itself to a contrary understanding antedating the execution of the 1980–83 collective agreement, overcoming its plain terms and excusing Respondent from complying therewith, likewise falls of its own weight. The mere fact that a subject is discussed in precontract negotiations neither overcomes the subsequent contract terms agreed upon nor exculpates a party from performance, notwithstanding any views he may have expressed during the negotiations—particularly where, as here, no commitment was arrived at by both sides contrary to the contract terms. No contractual reformation has been sought by Respondent, nor do I believe it would have any reasonable prospect of success upon the showing here made. In any event, whether it would or not, the fact is that the contract remains unreformed, and its terms here in question are clear, and no contrary or overriding agreement or modification has been established.

Under the circumstances, it is determined and concluded that, through its described actions in "loaning out" unit employees during the term and contrary to the express provisions of its collective agreements with the Charging Party, and its continuing insistence that it has the right to do so, Respondent has engaged in and is engaging in a continuing unilateral purported modification of those contracts during their term in violation of Section 8(a)(5) and (1), as well as Section 8(d), of the Act as alleged in the complaint. Respondent's motion to dismiss the complaint is accordingly in all respects denied.

Upon the foregoing findings and the entire record, I state the following:

CONCLUSIONS OF LAW

A. Jurisdiction is properly asserted in this proceeding.

B. Through its described actions in "loaning out" bargaining unit employees in unilateral purported change of and noncompliance with the terms of subsisting collective labor agreements with the Charging Party Union, during the term of those agreements, and its continued insistence that it has the right to do so, Respondent has, as alleged in the complaint, engaged and continues to engage in a midterm modification thereof in violation of Section 8(d) of the Act; has failed and refused to bargain with said Union as required by the Act, and continues so to do, in violation of Section 8(a)(5) of the Act; and has interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7, in violation of Section 8(a)(1) of the Act, and continues so to do.

C. Said unfair labor practices and violations, and each of them, have affected, are affecting, and, unless restrained and enjoined will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Respondent, having been found to have violated the Act in the respects described, should be required to cease and desist from those and like or related violations. Since no "loaned-out" unit employee suffered any diminution in pay during the "loan-out" period, it appears that no backpay or other wage claim is involved and that no monetary make-whole remedy is required. However, any seniority or other contractual benefits or emoluments which may have been lost by any "loaned-out" unit employee through a "loan-out" for a period in excess of that stipulated in the collective agreement should be required to be adjusted and rectified to conform to the situation which would have existed had that not occurred. Finally, the Order should require the usual posting of an appropriate informational notice to employees.

Upon the basis of the foregoing findings of fact, and conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, there is hereby issued the following:

ORDER[7]

It is hereby ordered that the Respondent, The Dow Chemical Company, Midland, Michigan, its officers, agents, successors, and assigns, shall:

A. Cease and desist from:

1. Unilaterally abrogating, nullifying, changing, or modifying, or purporting, continuing, or attempting so to do, or asserting to its bargaining unit employees or their union bargaining representative that it has the right so to do, the terms and conditions of its collective labor agreement with said Union limiting Respondent's reassignment or "loan-out" of said unit employees to 45 days without union steward approval, or to an additional 45 days with union steward approval, as set forth in Respondent's collective agreement with said Union. The bargaining unit here referred to is that set forth in Respondent's current collective agreement with said Union.

2. In any like or related manner unilaterally modifying or purporting to modify Respondent's subsisting collective-bargaining agreement with said Union during its term, or failing or refusing to bargain in good faith with

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

said Union concerning the same as required by the Act, or interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

B. Take the following affirmative actions necessary to effectuate the policies of the Act:

1. Adjust and correct the seniorities and all other contractual benefits or emoluments of said bargaining unit employees, so as to rectify any impairment thereof which occurred because of Respondent's assignment, transfer, detail, or "loan out" of any of said unit employees from his or her regular work assignment for a period in excess of 45 days without union steward approval or 90 days with union steward approval.

2. Post at its Midland, Michigan, plant premises, at each location therein where employees in the aforedescribed bargaining unit are employed, copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

3. Furnish to said Regional Director signed copies of the notice (Appendix), in a quantity to be designated by the Regional Director, for posting by the aforementioned Union at said Union's locations in the event so desired by the Union.

4. Notify said Regional Director, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT unilaterally and without bargaining and agreement with your Union, Local 12075, United Steelworkers of America, AFL-CIO-CLC, nullify, ignore, change, or modify our collective labor agreement with them, which limits our right to transfer or "loan out" a bargaining unit employee for more than 45 days without union steward approval, or for more than an additional 45 days with union steward approval; and WE WILL NOT continue to assert that we have that right.

WE WILL NOT in any like or related manner unilaterally modify or purport to modify your collective labor agreement while it is in effect, nor fail to refuse to bargain with, or impede or interfere with the efforts of your Union to bargain collectively on your behalf or to represent you under the National Labor Relations Act; or thereby to interfere with, restrain, or coerce you in the exercise of your rights guaranteed in the National Labor Relations Act.

WE WILL promptly make any necessary corrections and adjustments in the seniority and any other contractual benefits and emoluments of any bargaining unit employee whom we assigned, transferred, or "loaned out" from his or her regular job for a period in excess of 45 days without union steward approval, or in excess of 90 days with union steward approval.

The bargaining unit here referred to is that set forth in our 1980–83 collective agreement with Local 12075, United Steelworkers of America, AFL-CIO-CLC.

THE DOW CHEMICAL COMPANY